Filed 12/6/04 P. v. Martineau CA3

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. JOHN HOWARD MARTINEAU, Defendant and Appellant.	C045986 (Super. Ct. No. 02F8171)

After the trial court denied his motions to traverse and quash the search warrant and suppress evidence, defendant John Howard Martineau entered a negotiated plea of no contest to possession of marijuana for sale (Health & Saf. Code, § 11359) and possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)). He was sentenced to state prison for a stipulated term of three years.

On appeal, defendant contends that the trial court erred in ruling (1) he was not entitled to a hearing pursuant to *Franks v. Delaware* (1978) 438 U.S. 154 [57 L.Ed.2d 667] (*Franks*)

because the search warrant affidavit did not contain material omissions that amounted to reckless disregard for the truth, and (2) the search warrant affidavit did not rely on stale information and therefore contained sufficient probable cause. We shall affirm the judgment.

FACTUAL BACKGROUND

The facts of defendant's offenses are not at issue and may be summarized briefly.

On October 23, 2002, Shasta County District Attorney investigators and agents from the Multi-jurisdictional Methamphetamine Enforcement Team (CAL-MMET) executed a search warrant at defendant's residence to search for evidence related to the possible abduction of defendant's granddaughter. While searching the garage, investigators saw a ladder that led to an underground room that contained a marijuana grow.

A Shasta County deputy sheriff obtained a second warrant to search the property for marijuana and items related to cultivation. The property contained a sophisticated hydroponic marijuana grow room. A search of defendant's bedroom uncovered a rifle and ammunition. Numerous rifles and a .22-caliber handgun were located in the attic area of the grow room.

DISCUSSION

I. Denial of *Franks* Hearing

Defendant contends that the trial court violated his Fourth and Fourteenth Amendment rights when denying him a *Franks*

hearing to cross-examine the affiant regarding omissions in her affidavit, and erred in not suppressing the evidence against him because the information in the affidavit was stale. He further claims that the good faith exception to the warrant requirement could not save the search warrant. We are not persuaded.

A. Search Warrant Affidavit

On October 17, 2002, Shasta County District Attorney Investigator Heidi Farmer set forth the following information in her statement of probable cause submitted in support of her request for a search warrant at defendant's residence located on Weldon Street in Redding, California (defendant's residence), for the persons of defendant, his son J.P., his granddaughter, six-year-old N.C., and his mother E.M., and for vehicles associated with the residence and/or persons living there.

On December 5, 2001, the Shasta County District Attorney's Office, Child Abduction Unit, received a telephone call from O.C. that her husband, J.P., had taken their child, N.C., from Peru in January 2001 for a month-long vacation and had never returned to Peru. N.C. is both an American and Peruvian citizen. J.P. is an American citizen. O.C. explained that she and N.C. lived primarily in Peru and J.P. lived with O.C. only three to six months out of the year. The rest of the year J.P. traveled to Europe, South America and the United States. J.P.'s primary address while not in Peru was defendant's residence.

O.C. was petitioning the Peruvian courts for custody of N.C. Investigator Farmer checked with the Shasta County

Superior Court and learned that J.P. had not initiated custody orders for N.C.

O.C.'s last contact with J.P. by telephone was June 2001. Her last contact with him by e-mail was December 2001. Her last contact with N.C. by telephone and/or e-mail was April 2001. J.P. had refused O.C.'s request that he return to Peru or disclose N.C.'s location. He had cut off contact with O.C. Investigator Farmer traced J.P.'s e-mail address to a local Redding computer company and traced the telephone number from which J.P. had been speaking to O.C. to defendant's residence.

Investigator Farmer asked O.C. where J.P. got money to travel. She said that he did not have a job that she knew of when the two were married but that defendant sent him money orders. O.C. thought J.P. might have grown marijuana in the basement of defendant's residence.

On January 22, 2002, Investigator Farmer spoke with defendant at his residence. Defendant said J.P. was in Europe. Defendant said "they" would both be back in a few weeks.

In August 2002, Investigator Farmer went back to Weldon Street. Defendant said that J.P. was not home, that he was in contact with J.P., that N.C. was with J.P., and that he would have J.P. contact Farmer.

Investigator Farmer verified through the Shasta County Tax Assessor that the Weldon Street residence was deeded to defendant's mother, E.M., and her deceased husband. Farmer had

met E.M. at Weldon Street when Farmer was looking for J.P. E.M. identified herself as J.P.'s grandmother. She said "she knew what was going on but did not want to be involved," and would not explain further.

The Weldon Street address was the only address Investigator Farmer could locate for J.P. J.P. listed it as his address on his California driver's license and on his passport. He had 10 vehicles registered to him there. He represented Weldon Street as his address when visiting the Consulate of Peru in Los Angeles on March 6, 2002.

Investigator Farmer verified with U.S. Customs that J.P. had a valid U.S. passport. He traveled internationally at least twice in 2002: once on February 8 and once on April 7, both from London to San Francisco.

An arrest warrant issued for J.P.'s arrest on October 9, 2002.

On October 17, 2002, a search warrant was issued based on Investigator Farmer's affidavit. On October 23, 2002, Shasta County District Attorney investigators and CAL-MMET agents executed the search warrant at defendant's residence.

B. Defendant's Motions to Traverse the Search Warrant, Quash the Search Warrant and Suppress the Evidence

Defendant filed motions to traverse the search warrant, quash the search warrant and suppress the evidence against him, alleging that Investigator Farmer's affidavit contained

intentional or reckless misrepresentations and omissions and that the warrant was not supported by probable cause.

Defendant claimed that Investigator Farmer knew but failed to include the following facts in her affidavit: (1) there had been no court-ordered custody determination of N.C., that J.P. had a right to custody equal to any right of O.C., and that J.P. had initiated custody proceedings in Peru; (2) O.C. had given J.P. written permission to travel with N.C. out of the country for an indefinite period of time and that Attorney John Kucera had given a copy of this document to Farmer, along with other related documents; (3) J.P. had reason to believe that N.C. had been sexually molested while in O.C.'s care, that J.P. had sought professional help for N.C., and that Farmer had a copy of documents relating to the molest; and (4) Farmer knew that a parental abduction charge was not applicable when based on a reasonable belief that a child would suffer immediate bodily injury or emotional harm when left with the other parent.

Defendant attached his declaration to the motion to quash the search warrant that presented his version of the conversations that took place between him and Investigator Farmer in 2002. In January 2002, when Farmer came to his house, defendant stated he told her that J.P. did not live there and used it only as his United States address, and visited from time to time. He told her that J.P. and N.C. were traveling together out of the country with the written permission of O.C. He emphasized that O.C. gave them permission to travel for an

indefinite period of time and that she had been paid thousands of "U.S. dollars" in exchange for her signature. Defendant gave Farmer a copy of the travel permit and a picture of N.C. Defendant did not provide Farmer with any time or date that he expected J.P. and N.C. to be at the residence.

Defendant also provided Investigator Farmer with information regarding N.C.'s molest. Defendant told her that N.C. informed J.P. that she had been molested while living with O.C. in Peru. J.P. had told defendant that the perpetrators were employees of the United States government in Peru, including the "CIA, DEA, Army Rangers, and others." Defendant told Farmer that the molest had been reported to the FBI in San Francisco and that a complaint had been filed against the United States government in Peru. He gave Farmer a copy of the complaint. Defendant explained that N.C. had received psychological counseling in Cuba and would seek further medical treatment in Europe.

In his declaration, defendant also detailed his meeting with Investigator Farmer in August 2002. He told Farmer that J.P. and N.C. were traveling, that J.P. did not live on Weldon Street, and that he only visited. He spoke more of N.C.'s molest. He told Farmer that J.P. was seeking custody of N.C. in Peru and provided the name of J.P.'s attorney in Lima.

Defendant also stated that Investigator Farmer returned to his residence in early September with a police officer, but

defendant told her that Attorney Kucera had been hired to represent J.P. and that she should talk to Kucera.

Defendant's motion also attached Attorney Kucera's declaration that stated he was retained to represent J.P. in the child abduction allegation. He telephoned Investigator Farmer and told her that he had paperwork showing that J.P. had legal custody of N.C. and that J.P. had filed numerous reports regarding the molest. Attorney Kucera also stated that he had his secretary, Nancy Norton, mail Farmer documents relating to the defendant and J.P.'s assertions regarding the custody matter and N.C.'s molest. Defendant also submitted a declaration from Norton confirming that she sent Farmer the documents.

With respect to defendant's allegation that the search warrant was not supported by probable cause, defendant's motion stated that the information in the affidavit was stale, as it was based on 10-month-old information provided to Investigator Farmer by O.C., and it was based on an investigation that took place at the latest, two months before the issuance of the search warrant.

C. Hearing on Defendant's Motions

Before ruling on whether to permit defendant a *Franks* hearing, the trial court allowed the testimony of defendant and Child Protective Services (CPS) Intake Investigator Jacqueline Dunn.

Defendant testified that on January 22, 2002, Investigators Farmer and Dunn and a police officer came to his house to

inquire into J.P. and N.C.'s whereabouts. He told them that they were not there and that they were traveling together pursuant to a Peruvian travel permit. Defendant told them that he thought J.P. and/or N.C. would be at Weldon Street in a few weeks.[1] He gave them a copy of the travel permit, a picture of J.P. and N.C., and a copy of a criminal complaint. He explained that N.C. had been molested.

Defendant also testified about the last two visits that Investigator Farmer made to his house, in August and September of 2002. Defendant told her that J.P. and N.C. were traveling and that N.C. had contracted chlamydia. Defendant testified that J.P. did not live with him at Weldon Street, but that it was his United States address. J.P. reported Weldon Street as his address to the Department of Motor Vehicles, to the Peruvian Consulate in Los Angeles, on his passport, and received mail there.

Defendant also testified that between Farmer's first visit and her last visit, he had seen both J.P. and N.C. at his home but did not relay this information to Farmer.

CPS Investigator Dunn testified that she accompanied Investigator Farmer and another law enforcement officer to Weldon Street to investigate the possible abduction. She did not see a child or a young adult male in the house, but she did

[1] However, later in his testimony, defendant said that in stating he would be seeing them, he meant that J.P. and N.C. would be back from Europe in a few weeks, not back at the house.

see toys and crayons. Defendant told them that the CIA, DEA, and Army Rangers of Peru had sexually abused N.C. and that J.P. was hiding N.C. from these agencies.

After argument, the trial court ruled that there was "enormous probable cause for the issuance of a search warrant," there were no misstatements or material omissions in the affidavit, and there was no stale information relied upon by the affiant. Specifically, the court explained that Investigator Farmer's omission of information provided by J.P. and defendant did not degrade the quality of evidence presented in her affidavit, as the omitted information did not show that the information provided by O.C. regarding the possible abduction was false. The omitted information did not rebut the fact that J.P. took N.C., and that O.C. had not seen N.C. since that time. As to the issue of staleness, the court ruled that the circumstances described in the search warrant affidavit remained the same. Namely, the residential address of the person who was claimed to be hiding N.C. remained the same, and defendant's possessory interest in that property remained the same.

II. Probable Cause to Support the Search Warrant

A. Omissions in the Search Warrant Affidavit

"In *Franks*[, *supra*,] 438 U.S. 154 [57 L.Ed.2d 667], the United States Supreme Court held that a defendant may challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. When presented with such a challenge, the lower courts must conduct

an evidentiary hearing if a defendant makes a substantial showing that: (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to justify a finding of probable cause. At the evidentiary hearing, if the statements are proved by a preponderance of the evidence to be false or reckless, they must be considered excised. If the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized pursuant to that warrant must be suppressed. [Citation.] [¶] A defendant who challenges a search warrant based upon an affidavit containing omissions bears the burden of showing that the omissions were material to the determination of probable cause. [Citation.] 'Pursuant to [California Constitution, article I,] section 28[, subdivision] (d), materiality is evaluated by the test of *Illinois v. Gates* (1983) 462 U.S. 213 [76 L.Ed.2d 527] [(*Gates*)], which looks to the totality of the circumstances in determining whether a warrant affidavit establishes good cause for a search.'" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297.)

"The trial court's decision to not hold a *Franks* hearing is reviewed de novo on appeal." (*People v. Sandlin* (1991) 230 Cal.App.3d 1310, 1316; accord, *People v. Box* (1993) 14 Cal.App.4th 177, 183.)

With these considerations in mind, we review defendant's contention that the trial court erred in denying him a *Franks* hearing because of his claim that Investigator Farmer's affidavit contained omissions that were material to the determination of probable cause.

Defendant contends that Investigator Farmer omitted information from her affidavit that showed J.P. had a right to custody of N.C. and a right to travel with her. Specifically, defendant states that Farmer's affidavit omitted that O.C. had given J.P. written permission to take N.C. with him for an indefinite period of time, that J.P. had given O.C. a considerable sum of money to sign the travel document, that J.P. was represented by counsel in a child custody dispute in Peru, and that J.P.'s attorney in the United States had mailed Farmer documents verifying these facts. Defendant argues that this information was material because it might have cast doubt on Farmer's theory that J.P. had abducted N.C.

This information, however, is not inconsistent with the statements in Investigator Farmer's affidavit regarding O.C.'s allegations that she did not know N.C.'s whereabouts as of December 2001, even though J.P. had agreed to return her to Peru in February 2001, that J.P. had refused O.C. contact with N.C. since April 2001, and that J.P. had cut off contact with O.C. since December 2001. In short, while the omitted information could have shown that J.P. had the right to take N.C. on vacation and had the right to temporary custody of N.C., it did

not show that J.P. had the right to cut off O.C.'s contact with N.C. or refuse to disclose N.C.'s whereabouts to O.C. or to Farmer.

Defendant also contends that Investigator Farmer omitted information from her affidavit that would have shown N.C. had been molested while in O.C.'s custody and such information would have suggested J.P.'s fears for N.C.'s safety were justified when she was with O.C. We conclude that this omitted information would have supported, rather than defeated, the warrant application. Information that N.C. had been molested and that J.P. believed the molest had taken place while N.C. was in O.C.'s custody would have provided a motive for J.P. to abduct N.C.

Defendant further contends that Investigator Farmer omitted from her affidavit information he provided that J.P. did not live at Weldon Street but only visited from time to time. Defendant states that Farmer left no doubt that J.P. lived at that address even though he in fact did not. The affidavit stated that O.C. told Farmer that J.P. lived in Peru for three to six months out of the year and when he was not in Peru he was either traveling or at Weldon Street. The phone contact O.C. had with J.P. was to a phone number that Farmer traced to Weldon Street. Farmer traced J.P.'s e-mail address to a Redding company. Further, J.P. reported his address as defendant's Weldon Street residence to the Department of Motor Vehicles, to the Peruvian Consulate in March 2002, and received all his U.S.

mail there, which defendant admitted during his testimony. Defendant's statement to Farmer that J.P. did not live on Weldon Street would not have been a material omission in light of all the other uncontroverted evidence of J.P.'s connection with the residence.

Since defendant failed to establish the omitted information was material to a finding of probable cause to support the search warrant, he was not entitled to an evidentiary hearing. Accordingly, the trial court correctly denied defendant's request for a *Franks* hearing. (*Franks*, *supra*, 438 U.S. 154 [57 L.Ed.2d 667].)

B. Information Was Not Stale

Defendant also contends that the search warrant was not based upon probable cause because the information Investigator Farmer had that N.C. and J.P. would be at Weldon Street was stale. We disagree.

Probable cause to issue a search warrant exists when there is a "fair probability" that contraband or evidence of a crime will be discovered at the location to be searched. (*Gates*, *supra*, 462 U.S. at pp. 238-239 [76 L.Ed.2d at p. 548]; *People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1716.) We accord great deference to a magistrate's determination of probable cause and will reverse only where that determination is clearly erroneous. (*Gates*, *supra*, at p. 236 [76 L.Ed.2d at p. 547]; *People v. Cleland* (1990) 225 Cal.App.3d 388, 392.)

A search warrant affidavit must provide probable cause to believe the material to be seized is still on the premises to be searched when the warrant is sought. (*People v. Cooks* (1983) 141 Cal.App.3d 224, 298, citing *People v. Mesa* (1975) 14 Cal.3d 466, 470.) Where the circumstances "justify a person of ordinary prudence to conclude that the alleged illegal activity had persisted from the time of the stale information to the present, then the passage of time has not deprived the old information of all value." (*People v. Mikesell*, *supra*, 46 Cal.App.4th at p. 1718.) The question of staleness depends on the facts of each case. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 380.) In *Gibson*, surveillance established defendant's residence at the location named in the warrant between October 1998 and January 1999. The warrant was issued in June 1999. (*Id.* at p. 380.) Since there was no evidence that the situation had changed in the preceding six months, the information was not stale. (*Id.* at pp. 381-382.)

Here, there was no indication that the situation had changed so that evidence related to N.C.'s possible abduction would no longer be found at defendant's residence. There was no evidence that J.P. no longer used Weldon Street as his United States address. There was no evidence that J.P. had revealed N.C.'s whereabouts to O.C. or to Investigator Farmer even after Farmer's request to defendant to have J.P. contact her. In short, at the time the search warrant was issued, N.C.'s

whereabouts was still unknown to authorities and evidence still connected J.P. to Weldon Street.

Because we find that the warrant was issued on sufficient probable cause, we need not consider defendant's claim that the good faith exception of *United States v. Leon* (1984) 468 U.S. 897 [82 L.Ed.2d 677] is inapplicable to the facts of his case.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

SIMS, Acting P. J.

RAYE, J.